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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY HILKE,
Cross-Petitioner,

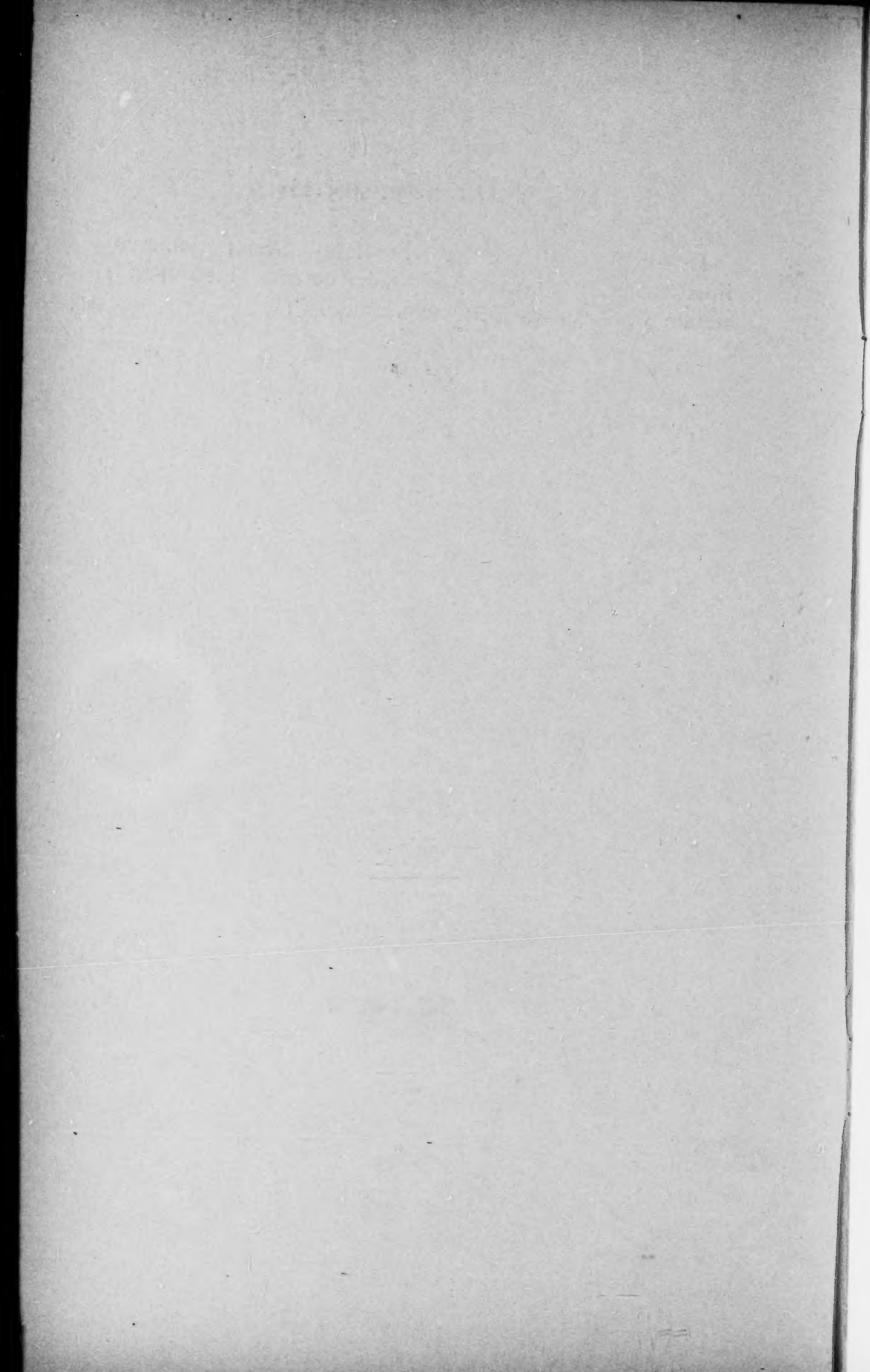
VS.

ERIC A. GRIFFIN,
Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a police officer who shoots a fleeing felon is entitled to assert a qualified immunity defense based upon a statute previously declared unconstitutional?

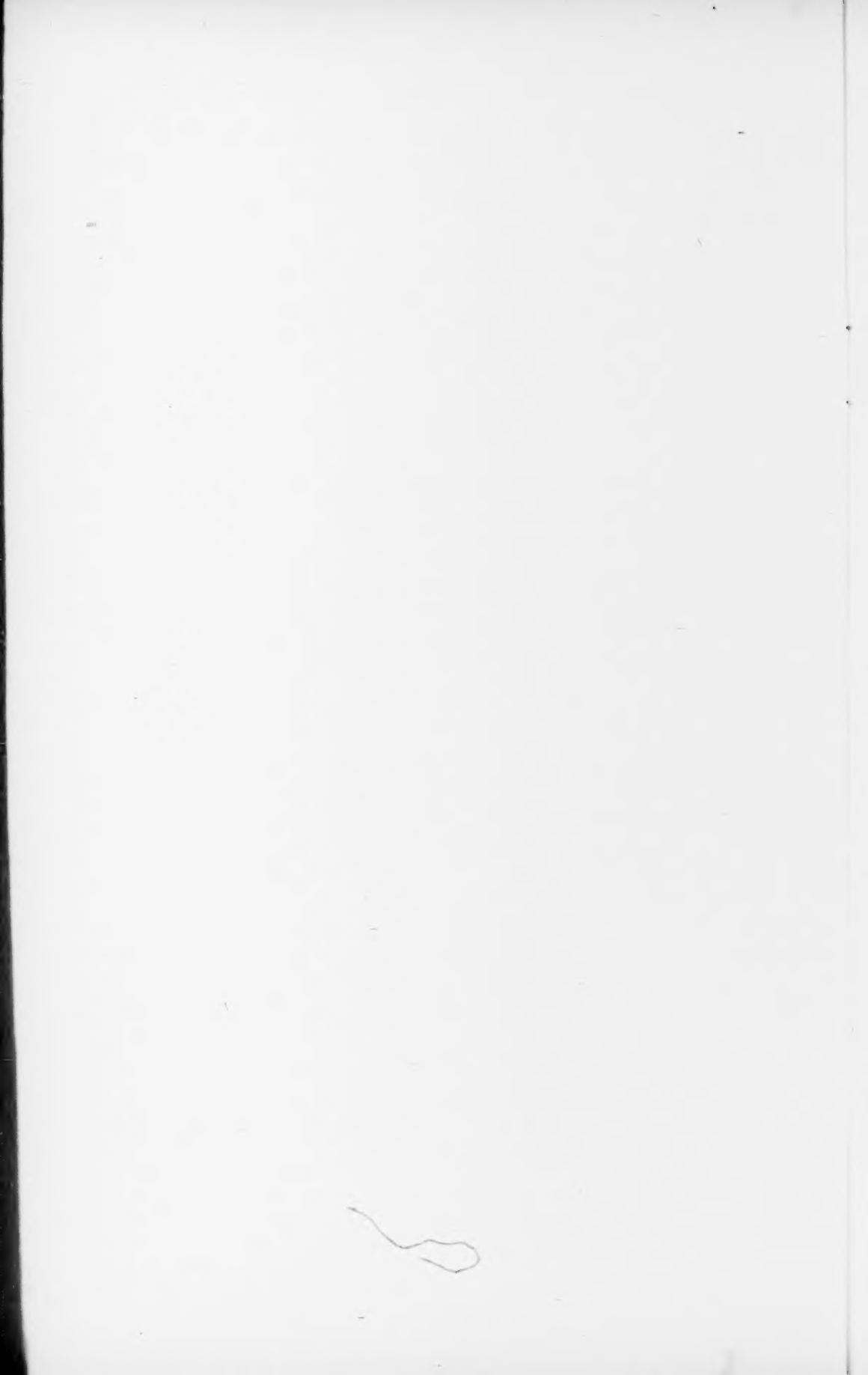


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CROSS-RESPONDENTS' BRIEF IN OPPOSITION

The cross-respondent, Eric A. Griffin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on November 6, 1986, and denial of rehearing on January 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 804 F.2d 1052, and is reprinted in the Appendix of Griffin's Petition, p. A-1a.

The memorandum decision of the United States District Court for the Eastern District of Missouri has not been reported. It is reprinted in the Appendix of Griffin's Petition p. B-12a.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the Cross-Respondent's suit was removed from state court to the Federal District Court, Eastern District of Missouri. On January 3, 1986, after verdict and judgment were entered for the Cross-Respondent, the Eastern District denied Cross-Petitioner's motion for judgment notwithstanding the verdict and for new trial.

On Cross-Petitioner's appeal, the Eighth Circuit on November 6, 1986, entered a judgment and an opinion reversing and remanding the Eastern District's judgment as to Hilke and directing the Cross-Respondent's action as to Stoll be dismissed for failure to present evidence that Stoll was more than negligent under §1983. Petition for Rehearing or Rehearing En Banc was denied on January 22, 1987.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Cross-Respondent, Griffin, incorporates by reference the statement of facts as set forth in Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526. (Pet. pp. 3 - 6.)

REASONS FOR DENYING CROSS-PETITIONER'S POSITION

I. A police officer who shoots a fleeing felon should not be entitled to assert a qualified immunity defense under a statute previously declared unconstitutional.

It is the shooting victim's position that the qualified immunity from suit defense is not available to the police who shoot an unarmed suspect whenever a question exists as to whether reasonable force was used. The mere existence of a statute which may have permitted deadly force shootings under limited circumstances does not mean the police can unilaterally assert that they complied with those circumstances.

In 1974, the Missouri deadly force statute was construed to mean shooting was permissible *as a last resort*. The police maintain they can tell the courts and shooting victims that they complied with the deadly force last resort component of the statute and hence be immune. The position that police can unilaterally, and without challenge, tell the courts that they complied with the requirements of the statute is preposterous and legally unprecedented.

Moreover, the Missouri deadly force statute was held to be unconstitutional in 1976. *Mattis v. Schnarr*, 547 F.2d 1007, 1009 (8th Cir. 1976). More stringent shooting guidelines were established after the *Mattis* ruling. See *St. Louis Board of Police Commissioners Regulations* at p. 5 of Griffin's Petition. These guidelines were state regulations and continued in effect through the time police officer Hilke shot Griffin. The guidelines establish *Tennessee v. Garner*, 105 S.Ct. 1694 (1985), Fourth Amendment limitations on deadly force.

Cross-Respondent/victim's position is simple. First, police are not entitled to qualified immunity from suit merely because a deadly force statute exists. Secondly, the police cannot

unilaterally tell the courts their behavior satisfied a deadly force statute when objectively the police behavior leaves room for reasonable minds to differ as to whether their behavior did or did not satisfy statutory requirements. Third, the more limited state regulations establishing *Tennessee v. Garner* deadly force guidelines prevail over and govern police conduct in the face of a state statute declared unconstitutional, despite a subsequent ruling that vacated *Mattis* on different grounds.

The issue of qualified immunity is discussed at greater length in Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526 at pages 14 - 18.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit, pursuant to Griffin's Petition for Writ of Certiorari, *Griffin v. Hilke*, No. 86-1526.

Respectfully submitted,

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